No. 87-319

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DALE ABRAHAMS et al.,

Petitioners,

vs.

LOUIS SHULMAN, derivatively on behalf of Central Jersey Industries, Inc. and Triangle Industries, Inc. and Central Jersey Industries, Inc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NORMAN ANNENBERG
Attorney for Petitioners
130 West 57th Street, 2A
New York, New York 10019
(212) 245-7375

Of Counsel:
MARGOLIS, CHASE, KOSICKI,
ABOYOUN & HARTMAN, P.A.
A Professional Corporation
60 Pompton Avenue (Route #23)
Verona, New Jersey 07044
(201) 239-3000

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The Documents Lodged With The Clerk of the Court**

We have lodged with the Clerk of the

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* Each of the two respondents has filed an opposition brief. In this reply brief, respondent Triangle Industries' brief is referred to as "T Br", and plaintiff-respondent Shulman's brief is referred to as "P Br."

Court, certified copies of the following documents which were part of the record below: transcript of the April 28, 1986 proceedings before the District Court (610a-634a), which refutes the endeavors of the petitioners to give this Court the misleading impression that the petitioners turned down the right to an evidentiary hearing; a letter dated April 29, 1986 from plaintiff-respondent's attorneys to the district judge, letter dated May 2, 1986 from objector-petitioners' attorneys to the district judge, and letter dated May 5, 1986 from the district judge to the attorneys for plaintiff-respondent, which collectively reveal that plaintiff-respondent's attorneys endeavored to hide the opinion received from an expert retained by them, that the original purchase of the Rowe

** The numbers on the bottom of each of the documents refer to the joint appendix filed in the Third Circuit.

shares from Triangle was unfair to CJI and would result in a substantial recovery in the derivative action (635a-639a); opinion of plaintiff-respondent's said expert, that the original Rowe transaction was unfair to the stockholders of CJI, which petitioners argue on PAGES 26-27 of the petition created an issue of fact which could not be decided without an evidentiary hearing (640a-644a); affidavit of petitioners' expert which petitioners argue on Pages 24-26 of their petition, created an issue of fact as to the valuation of the securities involved in the settlement exchange which could not be decided without an evidentiary hearing (647a-649a).

In Addition To Trying To Distort The Facts, The Respondents Have Made Admissions Which Reveal That Certiorari Should Be Granted

1. On pages 11-12 of T Br, petitioners, by deceptive-selective word

phrasing attempt to give this Court the misleading impression that on April 28, 1986, the district court wanted to proceed with an evidentiary hearing, and the petitioners refused to do so. A reading of the transcript reveals that the proceedings on that date involved nothing more than an application by the petitioners for an adjournment so that they could pursue prehearing procedures (612a-634a). Recognizing that in cases of this kind, the Third Circuit, like all other circuits, requires evidentiary hearings (Pet. P. 21-22), the plaintiff-respondent's attorneys requested the Court to hear the testimony of George Dormer, an investment banker who had assisted the plaintiff in the negotiation of the settlement, because he was going to be out of town. The Court refused to take any testimony (631a-632a), granted petittioners' requested adjournment, and indicated that he might make a decision

without holding any evidentiary hearing (634a). And this is what he did. He departed from the accepted and usual course of judicial proceedings by denying the petitioners pre trial discovery, by denying petitioners an evidentiary hearing with the right of cross examination, by deciding the matter on the basis of affidavits even though, in addition to the existence of many significant issues of fact particular to this case,* the Third Circuit, like other courts, has held that fairness of compromise is ipso facto a fact consideration involving the balancing of nine basically relevant factual factors. By sanctioning this

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* The other issues of fact involve: the fair market value of the securities given to Triangle by CJI, and particularly, whether they were to be valued on the basis of their value in the hands of Triangle rather than "in a theoretical open market" (Pet. P. 23); whether CJI was giving more than it was getting and hence paying to settle its own derivative suit (Pet. P. 25); the potential of recovery if the derivative suit were not settled (Pet. P. 27).

departure, in light of its previous decisions, the Third Circuit effectively disregarded FRCP 23.1, and held that settlement objectors are not entitled to the same due process and equal protection of the laws, as other litigants. One can only conclude that the district court and Third Circuit gave only boiler plate arbitrary approval to the settlement. For, if one were to assume that they applied any law to this case, one must conclude that they applied it in such a way as to discriminate against the petitioners. This is not justice; for justice can only mean equality of treatment by the courts.

On Page 19 of T Br, the petitioners have virtually conceded this departure from the accepted and usual course of judicial proceedings, by stating that "the ruling of the district court was a <u>factual determination</u> of the fairness, reasonableness and adequacy of the terms of the settlement..." (underscoring ours).

2. On Page 21-22 of T Br, respondents concede that the district court did not make findings of fact and conclusions of law; that neither the district court nor the Third Circuit wrote opinions or gave any explanations of the legal basis for their determinations; and that there are cases in the Second and Fifth Circuits which hold that district courts are required to issue opinions detailing the basis for their rulings on settlements. They argue that neither FRCP 52(a) nor the principles enunciated in these cases, applies to the case at bar because: (1) this case involves the fairness of a settlement rather than a final trial, and (2) the "record" sufficiently supports the fairness determination of the district court even though neither the district court nor Third Circuit explained how this is so.

The nub of respondents' argument is

that it was appropriate for the district court and Third Circuit to abandon the rule of law, and that this Court should sanction that abandonment by denying certiorari.

Petitioners, on the other hand, ask this Court to grant certiorari for the purpose of determining that in no circumstance is any Federal Court justified in abandoning the rule of law, and that every Federal judicial determination must be accompanied by an explanation showing that there was a legal basis therefor. Unless this is made clear, the way is left open for Federal Courts to make arbitrary, discriminatory and unprincipled determinations. See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harvard Law Review 1,17,19 (1959). Federal Courts, especially this Court, are required to be bastions of principle, due process, and equality, if their integrity is to be upheld and they

are to continue to maintain public confidence.

In Schlensky v Dorsey, 574 F 2d 131, 147 (1978), the Third Circuit vacated the district court's determination that a settlement was fair, even though it had made findings of fact and conclusions of law, because those findings and conclusions did not adequately afford the Third Circuit any indication of the legal standards under which the evidence was considered. In Protective Committee for Independent Stockholders of the TMT Trailer Ferry v Anderson, 390 US 414 (1968), this Court held that, even where the district court has made findings and conclusions "mere boiler plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law," is not enough, id at 434, and constitutes a legal deficiency sufficient to overcome the reluctance of a reviewing court to attack a settle-

ment approval. Id at 437. In Girsh v Jepson, 521 F 2d 153 (1975), the Third Circuit held that there are nine basically relevant factors which the district court must consider and weigh in determining the fairness of a settlement.

Taken together, these cases can only mean that especially in cases involving settlements, the district court is required to make findings of fact and conclusions of law, and to issue an opinion showing that it considered the nine basically relevant factors, and how it weighed and balanced them to reach its determination.

This conclusion also follows from the purposes behind FRCP 52(a) as stated by the Third Circuit and other circuits in the cases cited on Pages 27-33 of the petition, and the basic American jurisprudential system of rule by law. See also Winter Park Telephone Co. v Southern

Bell Telephone & Telegraph Co., 181 F 2d 341 (5th Cir. 1950); Browers v E.J. Rose Mfg. Co., 149 F 2d 612,616 (9th Cir., 1945) cert den 326 U S 753; 5A Moore's Fed. Practice, par. 5208 at 2378-2339 (2nd Ed., 1948), which stand for the proposition that in any situation where a court is called upon to make inferences from facts, it is required to make findings and conclusions.

Respondents argue that the abandonment of the rule of law in this case is not fatal because "the record" contains sufficient evidence supporting the determinations of the district court and Third Circuit. The simple answer is, that there is no "competent record" upon which any court could make a determination of whether the settlement was fair. The district court's departure from the accepted and usual course of judicial proceedings prevented such a record from being developed. Hence, from the point

of view of its evidentiary competency, the "record" in the case at bar is a nullity. Apart from this, even on the basis of the "incompetent" record, there is no way that this Court could ascertain if or how either the district court or the Third Circuit considered and weighed the nine Girsh factors.

3. On Page 26 of T Br, the respondents admit that the case involves the illegality of the issuance of the 320,000 three vote dual classification shares in light of Asarco v MRH Holmes A. Court, 611 F Supp 468 (D NJ 1985), and the other authorities cited by the petitioners on Pages 34-35 and 38 of the petition.* With this admission,

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* On Page 16 T Br, respondents incorrectly allege that petitioners' illegality argument was made for the first time in the Third Circuit. Respondents were caused by petitioners' illegality argument in the district court, to submit opinion letters of two law firms to the effect that the issuance of the shares was not illegal.

their argument on Pages 24-25 of their brief, that the Third Circuit was justified in making a judgment order because a written opinion in this case would have no precedential value, rings hollow. This factor alone foreclosed the Third Circuit from deciding by judgment order. IOP Ch 6A 1 (a).

Respondents' Page 20 T Br argument that this is a diversity case which does not turn upon an interpretation of the Federal Rules of Civil Procedure or any Rule of Evidence as required by IOP Ch 6 Sec A (1) (b) (5),* rings similarly hollow. This case turns upon an interpretation of FRCP 23.1: whether inherent in

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* In setting forth the provisions of IOP Ch 6 A (1) (b) (5) on P. 9 of the statues section of the petition, a typographical error was made by the inadvertent omission of one line. This has been corrected on the P. 25 footnote of T Br. Petitioners' arguments in the petition and the reply brief are predicated on the correct wording of this provision of the IOP.

the provision that a derivative action shall not be dismissed without the approval of the court and notice to the stockholders, is the requirement that objecting stockholders be accorded a due process evidentiary hearing; upon an interpretation of FRCP 52(a): whether the district court is required to make findings of fact and conclusions of law in determining the fairness of the settlement of a stockholders derivative action; upon a rule of evidence: the fundamental due process rule that a district court has no right to decide significant issues of fact, upon the basis of affidavits whose veracity is untested by cross examination.

4. Respondents' argument on P Br Pages 2 and 4 that certiorari should not be granted because the respondents' actions in disregard of the appeal mooted the case and cannot be undone, is wrong as a matter of law and fact, and was

anticipated and answered on Pages 52-56 of the petition. The suggestion that the petitioners are estopped from challenging the settlement because they did not try to stay the respondents from acting in disregard of the appeal, flies in the teeth of the well established rule that an appellant is not required to obtain a stay to prevent an appellee from acting in disregard of an appeal. 9 Moore's Federal Practice, Par. 2.08.03 at 8-9 (2d ed 1948) citing United Properties Inc v Emporium Dept. Stores Inc., 379 F 2d 72 (8th Cir 1967). The fact is, that none of the occurrences upon which the respondents rely for their claim of mootness, prevents the granting of meaningful relief to the petitioners, and from causing the undoing of Triangle's acts in disregard of the pending appeal. Nor could those occurrences moot the judicial abandonment of the rule of law and violations of petitioners' constitutional rights in this

case.

As evidenced by the fact that the Third Circuit affirmed the judgment of the district court instead of dismissing the appeal, it is apparent that the Third Circuit rejected respondents' mootness argument.

CONCLUSION

This Court should grant certiorari and determine that the courts below abandoned the rule of law and violated the petitioners' constitutional rights.

Respectfully submitted,

Norman Annenberg
attorney for petitioners
130 West 57th Street
New York, NY 10019
(212) 245-7575

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